In the United States Court of Appeals for the Ninth Circuit

No. 18,217

CONSTRUCTION, PRODUCTION & MAINTENANCE LABORERS UNION LOCAL 383, AFL-CIO; AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1089, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

INDEPENDENT CONTRACTORS ASSOCIATION, INTERVENOR

No. 18,293

INDEPENDENT CONTRACTORS ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petitions To Review and On Cross-Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This consolidated case is before the Court upon petition of Construction, Production & Maintenance Laborers Union Local No. 383, AFL-CIO, and United Brotherhood of Carpenters Local No. 1089, AFL-CIO (hereafter referred to individually as Local 383 and Local 1089, and collectively as "the Unions") to review an order of the National Labor Relations Board issued against them on July 26, 1962, following proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), and upon the separate petition of Independent Contractors Association (hereafter, "Association") to review another portion of the Board's order dismissing certain allegations in the complaint. The Association has also intervened in connection with the Unions' petition. The Board's decision and order (R. 54-67, 25-32)[1] are reported at 137 NLRB No. 149. In its answers, the Board has cross-petitioned for enforcement of its order against the Unions and has requested denial of the Association's petition. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having oc-

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[1] References to the pleadings, the decision and order of the Board, and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." Wherever a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

curred at Phoenix and Scottsdale, Arizona, within this judicial circuit.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that the Unions violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act by picketing Colson and Stevens Construction Company, Inc., herein called Colson, to force Colson's acceptance of contract terms, prohibited by Section 8(e) of the Act, which would have required Colson to cease doing business with its nonunion subcontractors unless the latter also complied with the contract's provisions. The evidence upon which the Board's findings rest may be summarized as follows:

Colson is a general contractor in the building and construction industry in Phoenix, Arizona, where in October, 1960, it was beginning work on a construction project known as the "Yellow Front store" (R. 25-26; Tr. 172, 188, 245-246). At that time, its employees were not represented by any union, nor had Colson been party to any collective bargaining agreement during its two-year existence (Tr. 176-177, 264). Early in October, Local 1089 asked the Phoenix Building and Construction Trades Council to put Colson on its "unfair" list, and in response to this request the Council appointed a committee to investigate the matter (R. 26; Tr. 280-285).

On October 14, a group from the Council including Ralph Ellison, assistant business representative of Local 1089, approached Colson and Stevens at the

Yellow Front construction site (R. 26; Tr. 357). Ellison asked Company President Walter Colson to recognize Local 1089 as representative of Colson's carpenter employees by signing with the Union, reminding Walter Colson that "he had been signatory to the agreement before" (R. 26; Tr. 190, 359).[2] Walter Colson understood that recognition of Local 1089 would mean adoption of the "Arizona Master Labor Agreement," [3] Article I-C of which provided (R. 26-27; Tr. 190, 192-193, G.C. Exh. 44):

> That if the Contractors, parties hereto shall subcontract construction work as defined hereafter in Article III of this Agreement, the terms of said Agreement shall extend to and bind such construction subcontract work, and provisions shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement. A subcontractor is defined as any person, firm or corporation who agrees under contract with the general contractor or his subcontractor to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of

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[2] Walter Colson, as president of other construction companies, had in past years been signatory to the Carpenters' agreement (Tr. 192, 367).

[3] A "master" collective agreement to which Local 1089, Local 383, and a number of other labor organizations are parties, together with a number of Arizona general contractors and contractors' associations, it consists of twenty articles of general applicability, supplemented by appendices fixing wages and working rules for particular crafts (R. 26; G.C. Exh. 44).

> equipment, performance of labor and the furnishing and installation of materials. . . .

Colson noted that he had some non-union subcontractors on the Yellow Front project and, because signing up with Local 1089 would entail dropping such subcontractors, told Ellison that the Company could not then afford to recognize his union; "it would work a hardship on the company . . . the cancelling of the [sub]contracts . . . that were already tied up" (R. 26-27; Tr. 190-191, 248-249).[4]

On October 19, on the basis of Ellison's report of his meeting with Colson the previous week, Local 1089 established a picket at the Yellow Front project site, his sign proclaiming a purpose to "organize and represent" Colson's carpenters (R. 27; Tr. 285-288, 193, 250). As a consequence of the picketing, which continued until November 17, delivery of supplies to the project was impeded (R. 27; Tr. 250-251, 253-254, 255-256, 257-258, 195-198, 127-128, 144-146, 199, 234).

Union representatives again met with Colson and Stevens on January 12, 1961. This time the group included a representative of Local 383, and Ellison of Local 1089 was present as before, now accompanied by his union superior, Clyde English (R. 27; Tr. 258-260, 300, 205, 285-286). Again the question of recognition and "the agreement" was raised; "the whole meat of the conversation was to join the union

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[4] The Schwartz Plumbing Company and Earl H. Haun, a masonry contractor, both non-union, participated in the Yellow Front construction project under subcontracts from Colson (Tr. 141-142, 121-122, 127).

or become signatory to the Arizona Master Labor Agreement," copies of which were given to both Colson and Stevens (R. 27; Tr. 201-204, 260, 264-265, 301-302, 304). During discussion of the necessity of Colson obtaining subcontractors who would comply with the Master Agreement, Colson protested that the firm had a church construction project then under way and could not very well "convert that job to all union subcontractors," whereupon a member of the group suggested the possibility of Colson being allowed to "slide through" on the church job provided it convert to all union subcontractors for the construction of two schools on which the Company had been awarded the prime contract (R. 27; Tr. 202, 302, 305A, 261, 204). Colson said this would work a hardship on the Company, but that it would compare prices of union and nonunion subcontractors in its files, and if the differential was small enough, the Company would "consider their proposition—becoming signatory to the Arizona Master Labor Agreement" (R. 27; Tr. 202-203, 204, 305B-306, 341-342, 262). The unions, in turn, stated that they would take up with the other members of the Building and Construction Trades Council at its meeting five days hence the matter of permitting Colson to complete its church project with the subcontractors then on the job (Tr. 206, 306-307, 341-342, 374-375, 262).

Colson and Stevens had no further personal contact with the Unions (Tr. 269, 208). However, on January 25, after the Company and its subcontractors had begun construction of the Tonto and Kiva

schools, Local 383 posted a picket at the school sites, the picket sign reading, "Picket against Colson and Stevens. Laborers Local 383 wants to organize and bargain for laborers employed by Colson and Stevens." (R. 27; Tr. 400-401, 262-264). Patrolling was maintained until February 20 when Local 383 "pulled the picket off" (R. 27; Tr. 401). During the period of picketing, suppliers of both Colson and its subcontractors failed to made deliveries because their employees would not cross the picket line (R. 27; Tr. 266, 129-130).[5]

II. The Board's Conclusions and Order

The Board, all five members participating, unanimously concluded from the foregoing facts that Local 1089 and Local 383 violated Section 8(b)(4)(i)(ii)(A) and (B) of the Act by picketing for the Arizona Master Labor Agreement with its Article I-C, a contract clause proscribed by Section 8(e) of the Act, and thereby to force Colson to cease doing business with its nonunion subcontractors if they too did not abide by the contract's terms (R. 54-57). The Board further concluded, two members dissenting, that since neither union's picketing was conducted for more than a reasonable time not to exceed 30

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[5] While Colson's subcontractors on the schools included Earl Haun, who had also been masonry subcontractor on the Yellow Front project, and Riggs Plumbing and Heating Company, the Tonto and Kiva projects were not totally nonunion (Tr. 208-209, 269). In each case, the termite-proofing subcontractor, who was unionized, performed its work during the period of picketing but after 5:00 p.m. when the picket had left for the day (Tr. 270, 272-274).

days, and the record did not establish joint action so as to make each union responsible for the other's picketing, the Unions had not violated Section 8(b)(7)(C) of the Act (R. 57-59).

The Board's order requires the Unions to cease and desist from the unfair labor practices found and, affirmatively, to post appropriate notices (R. 60-62, 66-67).

ARGUMENT

I. The Board Properly Found That the Unions' Picketing of Colson Violated Section 8(b)(4)(i)(ii)(A) and (B) of the Act

A. *Introduction—the statutory provisions and the issues*

Section 8(b)(4)(i) and (ii)(A) and (B) of the amended Act, like their predecessor, Section 8(b)(4)(A) of the Taft-Hartley Act, are basically "secondary boycott" provisions, aimed at prohibiting a union from enmeshing a neutral employer in the union's differences with other, "primary" employers. As did their predecessor, the amended provisions proscribe particular types of conduct by unions for particular objectives. The conduct condemned is that described by subsections (i) and (ii) of Section 8(b)(4), which prohibit a labor organization from striking or inducing a strike or refusal to perform services, or threatening, restraining or coercing any person, for an objective contained in paragraph (A) or (B) of 8(b)(4). No issue is presented in this case with respect to the means used by the Unions, for each concededly picketed Colson, and picketing is

manifestly within the scope of subsections (i) and (ii).

Subsection (B) of 8(b)(4) contains essentially the same unlawful object that was contained in Section 8(b)(4)(A) prior to the 1959 amendments. In effect, that object is to force one person to cease doing business with another, and, with respect to the amended (B) as well as the old (A), by consistent construction the person subject to the union's proscribed pressure must be a neutral. Subsection (A) of the amended Act repeats one of the unlawful objects contained in the old Section 8(b)(4)(A)[6] and adds a wholly new unlawful object, that of forcing or requiring any person "to enter into any agreement which is prohibited by Section 8(e)." Section 8(e), in turn, provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void:

Section 8(e) then sets forth two provisos. The first, which relates to the construction industry, states:

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[6] This repeated object, which is not relevant here, is "forcing or requiring any employer or self-employed person to join any labor or employer organization."

> Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:

The second, which relates to the garment industry and is not directly involved here but is of significance, as we show below, in interpreting the scope of the first proviso, states:

> Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer" or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry.

The Board concluded that the Unions violated Section 8(b)(4)(i)(ii)(A) and (B) of the Act by picketing Colson, a general contractor, to force or require Colson to enter into an agreement that it would do business only with subcontractors who would abide by the contract's provisions, and, therefore, as a consequence, to compel Colson to cease doing business with its nonunion subcontractors Schwartz, Riggs and Haun, if they did not so comply. The sub-

contracting clause sought by the Unions provided as follows:

> That if the Contractors, parties hereto shall subcontract construction work as defined hereafter in Article III of this Agreement, the terms of said Agreement shall extend to and bind such construction subcontract work, and provisions shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement. A subcontractor is defined as any person, firm or corporation who agrees under contract with the general contractor or his subcontractor to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of equipment, performance of labor and the furnishing and installation of materials. . . .

The Unions contend that the Board's conclusions are insufficiently supported in fact and erroneous in law. Thus, they argue that there is not substantial evidence that "an object" of their picketing was to force Colson's acceptance of the Arizona Master Labor Agreement, and that, in any event, picketing for such an object is "primary" and therefore not within the reach of Section 8(b)(4)(A) or (B)—the "secondary boycott" provisions of the amended Act. In the latter connection, they assert that subcontracting clauses like Article I-C of the Master Agreement deal with mandatory subjects of bargaining for which strike pressure may be employed. The Unions further contend that Section 8(b)(4)(A) and (B) cannot apply to their conduct because a proviso to Section 8(e) legalizes in the construction industry agree-

ments to cease doing business that would otherwise be unlawful under Section 8(e). Finally, they urge that the subcontracting clause in question would not require Colson to cease doing business with other persons within the meaning of Section 8(b)(4)(B).

We show below that the Board's conclusions are in all respects proper in law and supported by substantial evidence on the whole record. We show further that the defenses advanced by the Unions are without merit.

B. *Substantial evidence supports the Board's finding that an object of each union's picketing was to force Colson to adopt the Arizona Master Labor Agreement*

The evidence summarized above fully establishes that each Union "by its picketing and oral demands, sought to have Colson sign the Master Agreement" with its provision restricting the persons with whom the employer might do business (R. 55). Thus, when the group of union agents first accosted Colson at the Yellow Front construction site in October and Local 1089's representative, Ellison, asked for recognition, discussion focused on Colson "signing their agreement" (Tr. 190). Clearly, recognition meant signing a contract, and this in turn meant the Master Agreement. Thus, Ellison's admitted purpose in calling on Colson was to negotiate a contract, and his union superior admitted at the hearing that in the view and practice of Local 1089, "to negotiate a contract" is "getting [the employer] to sign the Arizona Master Labor Agreement" (Tr. 336-338, 368). And while "perhaps," as the Trial Examiner noted, the

Master Agreement "was not formally proposed by Ellison on October 14," the record reveals and the Examiner further noted that Colson, who was familiar with the Union's bargaining practices, "obviously knew" that this was Ellison's objective (R. 28; Tr. 190, 192-193).[7]

When Colson refused to sign, explaining that the company could not afford to drop its nonunion subcontractors, the conversation came to an end and, shortly thereafter, pickets appeared at the Yellow Front site, their signs demanding recognition and bargaining rights (*supra*, p. 5). Local 1089 admittedly ordered the picketing in response to Colson's October 14 refusal to grant the Union's demands (Tr. 285-287). Accordingly, the Board could reasonably conclude that the Union's objective in picketing on and after October 19 was acceptance of the Master Agreement which, less than a week earlier, Colson had rejected.

Likewise, after Colson again declined to become party to the Master Agreement at the January 12 meeting with representatives of Local 1089, Local 383, and other unions, Local 383 began picketing the Tonto and Kiva school construction projects. The testimony of both company and union participants in the January 12 meeting shows that it was addressed

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[7] At the outset of their conversation, Ellison reminded Colson that "he had been signatory to the agreement before" (Tr. 359). As a witness, Ellison explained that Colson, on behalf of construction companies which he then headed, had in two prior years "signed two other contracts for me personally" (Tr. 367).

almost exclusively to the question of Colson signing the Master Agreement, copies of which were presented to each Colson partner, and to the consequences for the Company's subcontracting arrangements should Colson sign (R. 27; Tr. 201-204, 260-262, 264-265, 301-302, 304-305, 362-363, 364). Union witnesses admitted at the hearing that, as Colson and Stevens testified, the partners had resisted signing because "it would work a hardship on them if they had to change [sub]contractors in the middle of [a] church" that they were then building, admitted further that a union agent suggested the possibility of making the forthcoming school projects the "breaking-off point" when Colson would cease using nonunion subcontractors, that the Company then agreed (although subcontracts had already been let for the schools) to investigate the cost of substituting all-union subcontractors and to consider signing the Master Agreement if such a substitution were feasible, and finally that the unions agreed to propose at their Building Trades Council meeting the next week that the Company be permitted to complete its church construction job with its existing nonunion subcontractors (Tr. 302, 304-307, 341-342, 364, 374-375, 386-388). As the petitioning Unions note in their brief, p. 8, the record contains conflicting testimony as to what was said during the meeting about subsequent communication between the unions and Colson;[8] but whatever may have been said as the meet-

[8] According to Colson and Stevens, the unions were to inform them of the result of the Building Trades meeting and also whether Haun, who had earlier been awarded a sub-

ing concluded, it is uncontested that, as matters turned out, there was no further contact of any sort between the Company and the unions until Local 383's picket appeared at the Tonto school construction site two weeks later, on January 25, his placard demanding bargaining rights for Colson's laborers. Considering Local 383's participation in the January 12 meeting, the acknowledgment by its business agent that it would not have picketed had Colson signed the Master Agreement at that time or had it agreed to do so prior to the Building Trades meeting five days thereafter, and the fact that admittedly Local 383 did not otherwise contact Colson concerning a contract either before or after posting its picket (Tr. 400, 421-423), the Board was fully warranted in concluding that the objective of Local 383's picketing was to force Colson's acceptance of the Master Agreement.

C. ***The Unions' picketing for a secondary subcontracting clause violated Section 8(b)(4)(A) of the amended Act***

During the decade following enactment of the original secondary boycott provisions of the Act it became apparent that unions could still successfully

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contract on the school projects, would also go union; and at that time they were to tell the unions "where we stood with our subcontractors" (Tr. 204-205, 206-207, 262). However, according to Clyde English, business representative of Local 1089 and the chief union spokesman at the meeting, Colson was to telephone him prior to the Building Trades meeting with the Company's decision on signing the Master Agreement and converting to union subcontractors (Tr. 307, 341-342, 280, 301).

subject "unoffending employers and others [to] pressures in controversies not their own" (*N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 692) by writing into collective bargaining agreements provisions committing an employer to cease doing business with others to whom the contracting union objected. For in *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93 (the *Sand Door* case), while holding that such a contract could not be enforced by strikes or inducements of employees concertedly to withhold services, the Supreme Court made clear that "an employer may *voluntarily* sanction and support a boycott and hence his *agreement* to do so is not unlawful" (*N.L.R.B.* v. *Amalgamated Lithographers*, 309 F.2d 31, 39 n. 12 (C.A. 9), cert. denied, 372 U.S. 943 (emphasis added)). The agreement itself was lawful, with "legal radiations" (*Sand Door* at 108); that is, it was enforceable by any means other than those specifically prohibited by Section 8(b)(4). Moreover, were an employer unwilling thus to consent to a boycott, the union could back up its contract demand with economic or other pressure "so long as it refrain[ed] from the [sole] prohibited means of coercion through inducement of employees" (*id.* at 99).

As this Court has pointed out, it was the loopholes disclosed by the *Sand Door* decision that motivated Congress, in 1959, to enact the new Section 8(e) outlawing agreements to engage in secondary boycotts and "[to add] language to section 8(b)(4)(A) making it an unfair labor practice for a union to strike

or engage in other coercive activity *for the purpose of forcing an employer to enter into an agreement of the kind described in section 8(e)" (N.L.R.B.* v. *Amalgamated Lithographers*, 309 F.2d 31, 39 n. 12 (C.A. 9), cert. denied, 372 U.S. 943 (emphasis added)).

As we discuss more fully below, pp. 27-36, Article I-C of the Arizona Master Labor Agreement for which the Unions picketed Colson, since it would have barred Colson from continuing to subcontract to any subcontractor not willing himself to be bound by the Master Agreement, is indisputably "an agreement of the kind described in section 8(e)" (*Amalgamated Lithographers, supra*). Accordingly, the Unions could not picket to force Colson's adoption of the Master Agreement without violating Section 8(b)(4)(A) unless, as the petitioning Unions contend, the construction industry proviso to Section 8(e) immunizes coercive conduct otherwise violative of Section 8(b)(4)(A). We show now that the Board properly rejected this contention, and concluded that Section 8(b)(4)(A) interdicts the denominated conduct in a construction industry context.

1. *Section 8(b)(4)(A) applies to coercive attempts by the building trades to obtain employer agreements to cease doing business*

Section 8(b)(4)(A) of the amended Act proscribes coercive union activity to force upon an employer "any agreement which is prohibited by section 8(e)." The latter section, with two limited exceptions, creates a sweeping ban on *any agreement*, whether ex-

press or implied, by which an employer becomes committed to cease doing business with "any other person." The two exceptions, embodied in separate provisos to Section 8(e), differ markedly in scope (see *supra*, pp. 9-10).

In the garment industry, persons in certain relationships are excluded from the definitional phrases of both Section 8(e) and Section 8(b)(4)(B), so that unions dealing with such persons may not only make restrictive agreements but also coerce a cessation of business, whether the coerced employer has or has not contractually committed himself to boycott and whether the union is seeking an immediate severance of business relations with named individuals or a long-term boycott of an entire category of other persons. The construction industry proviso, by contrast, simply makes Section 8(e) inapplicable to "an agreement" relating to the contracting or subcontracting of construction site work. Thus, building contractors and unions who agree upon such restrictions do not thereby commit an unfair labor practice, and the agreement reached is not "unenforcible and void" but may be enforced by any conduct not violative of Section 8(b)(4)(B)—for the latter section is fully applicable to construction unions. Not only does this proviso not mention 8(b)(4)(B) as does the garment industry proviso, but the authoritative legislative history is explicit: "Since the proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is appli-

cable." [9] Moreover, "it [the proviso] is not intended to change the law . . . with respect to the legality of a strike to obtain such a contract." [10]

The construction industry proviso, then, "permits the making of *voluntary* agreements." [11] As Senator Kennedy, the conference chairman, stated in his analysis of the conference bill prior to its adoption, the proviso "is intended to preserve the present state of the law . . . with respect to the validity of agreements. . . . by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor" (105 Cong. Rec. 17900, II Leg. Hist. 1433). This was necessary, he explained, "to avoid serious damage to the pattern of collective bargaining in [this] industry" (105 Cong. Rec. 17899, II Leg. Hist. 1432). As was pointed out in a 1950 study of building trades bargaining in the 12 counties of southern California, where a master agreement establishing basic employment standards has been in effect since 1941 in

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[9] Analysis of Senator Kennedy during debate on the conference bill, 105 Cong. Rec. 17900, II Leg. Hist. 1433 ("Leg. Hist." refers to the two-volume work, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (G.P.O. 1959)). See also the report of the House conferees, H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 39, I Leg. Hist. 943.

[10] Analysis of Senator Kennedy, *supra*, n. 9.

[11] Statement of Chairman Barden of the House Labor Committee, a member of the conference committee where the proviso originated, in presenting the conference report to the House (emphasis added), 105 Cong. Rec. 18128, II Leg. Hist. 1715.

which 19 building trades unions participate together with the 10 building trades councils and the major contractors' associations, "for the well-established employers, it is also important to have a floor under competitive labor costs." [12] The structure of the industry, with subcontracting a customary way of doing business, leads many employers to favor subcontracting clauses as a means of undergirding such a "floor." The southern California master labor agreement referred to above contains such a clause,[13] similar to the clause that the petitioner Unions sought to force upon Colson, as a result of which "any subcontractor [of a signatory contractor] who attempts to depart from the established union standards faces cancellation of his contracts and an immediate loss of business." 70 Monthly Labor Review at 17. On the other hand, if the contractor is unwilling in the circumstances to cancel the subcontract, or if he lets a subcontract to one who refuses to become bound by the master labor agreement, then the signatory contractor faces suit by the unions for specific performance, with an interruption of work on his project occasioned by a change of subcontractors, and perhaps a damage suit by the ousted subcontractor.

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[12] Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 Monthly Labor Review 14 (U.S. Dept. of Labor, B.L.S., 1950).

[13] "That if the contractors, parties hereto, shall subcontract work as defined herein, provision shall be made in such subcontract for the observance by said subcontractor of the terms of this Agreement." Quoted in 70 Monthly Labor Review at 17.

This bargaining pattern, with these effects, Congress believed legitimate and left lawful, so long as the restrictive agreement represents the free choice of the parties.

The limited reach of the construction industry exemption was intentional. During the 86th Congress, while the committee of conference was considering the House- and Senate-passed bills (neither of which made any special provision for construction industry secondary boycott agreements), a group of Senate conferees put forth a proposal to accord the construction industry the same broad exception subsequently granted the garment industry. In that same proposal, S. Res. 181, 86th Cong., 1st Sess., 105 Cong. Rec. 17332-17333, II Leg. Hist. 1382-1383, the clause in Section 8(b)(4)(A) here found violated first appeared. The conference committee and subsequently the Congress adopted the proposed amendment to 8(b)(4)(A), but, as we have seen, did not adopt the proposed immunization of secondary pressure by building trades unions. Moreover, at the same time that it adopted the 8(b)(4)(A) clause, the conference committee dropped from the amended 8(b)(4)(B) the phrase "or agree to cease" which had appeared in the House-passed bill. Explaining this deletion, the House managers stated in their report accompanying the conference bill that the restrictions thereby imposed were included in "the other provisions" dealing with secondary boycott agreements "and therefore their retention in section 8(b)(4)(B) would constitute a duplication of language" (H.R. Rep. No. 1147 on S. 1555, 86th

Cong., 1st Sess., p. 38, I Leg. Hist. 942). The "other provisions" referred to can only be Section 8(b)(4)(A), for only that section (and not 8(e)) shares with 8(b)(4)(B) the requirement of coercive means. Therefore, if the deleted phrase would have been "a duplication," the reach of 8(b)(4)(A) must be coextensive with that of 8(b)(4)(B), and as we have shown, the latter provision has always been fully applicable to construction unions.

The special treatment accorded the construction industry by Section 8(e)—authorization to enter into and to enforce subcontracting agreements so long as the unions refrain from coercive economic pressures—is comparable in nature to the special treatment of that industry elsewhere in the amended Act. By the new Section 8(f), Congress likewise gave recognition to the special circumstances pertaining in the industry and differentiating it from manufacturing and sales enterprises. Section 8(f) permits construction unions and employers to enter into prehire collective bargaining agreements and to make the union-security provisions of their contracts effective after only 7 days, practices which would otherwise constitute employer violations of Section 8(a)(1), (2), and (3) and union violations of Section 8(b)(1)(A) and (2). Again, the permission thus given is permission to enter into voluntary agreements. As the legislative history makes clear, Congress did not intend by Section 8(f) to legitimize strikes or picketing to coerce an employer's acceptance of these agreements. H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p.

42, I Leg. Hist. 946 ("Nothing in [8(f)] is intended . . . to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such prehire agreements."); 105 Cong. Rec. 18128, II Leg. Hist. 1715 [14]; cf., *Sperry* v. *Local Union No. 562, United Association,* F. Supp. (W.D. Mo.), 52 LRRM 2673, 2676-2677 (holding that Section 8(f) provides no defense to an 8(b)(7)(C) charge); *N.L.R.B.* v. *Int'l Hod Carriers Union, Local 1140*, 285 F.2d 397, 403 (C.A. 8), cert. denied, 366 U.S. 903.

In amending Section 8(b)(4)(A) and adding 8(e), Congress sought to broaden and tighten the statutory ban on coercive involvement of neutral employers in labor disputes not their own. Nothing in the amendments adopted nor in their legislative history suggests that in so doing, Congress meant to sanction any conduct previously unlawful. Yet, if the first proviso to 8(e) creates an immunity also from the specific inhibition of Section 8(b)(4)(A), it thereby exempts conduct which was already prohibited by the more general secondary boycott provision of the 1947 Act. For, as we shall show hereafter (Part I. D., pp. 37-44), strikes or picket-

[14] Cong. Barden reading into the record a colloquy on the Senate floor in 1958 as to the interpretation to be given a provision then under consideration similar to 8(f). Senator Kennedy there stated, "nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements."

ing to force a building contractor to cease doing business with a group of other persons, by the device of exacting his legally-enforceable contractual commitment to do so, had been held unlawful under Section 8(b)(4)(A) of the Taft-Hartley Act.[15] Thus, in amending Section 8(b)(4)(A) in 1959, Congress made explicit what "the process of litigating elucidation" (*Int'l Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617, 619) revealed to have been implicit in the more general provision of the prior law. And in enacting the first proviso to Section 8(e), Congress avowedly did not intend "that this proviso should be construed so as * * * to remove the limitations which the present law imposes with respect to such agreements. * * * It is not intended that the proviso change the existing law * * * with respect to the legality of a strike to obtain such a contract." H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., pp. 39-40, I Leg. Hist. 943-944. In sum, picketing and other proscribed conduct to exact an employer's consent to a contract clause limiting the persons with whom he may continue to contract was unlawful under the general cease-doing-business provisions of the 1947 Act, and Congress in 1959, while carrying forward those provisions, in addition created a separate unfair labor practice specifically

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[15] *N.L.R.B.* v. *Local 47, Int'l Brotherhood of Teamsters*, 234 F.2d 296 (C.A. 5); *Bricklayers, Masons and Plasterers Int'l Union (Selby-Battersby)*, 125 NLRB 1179; and see discussion of the *Sand Door* case, 357 U.S. 93, *infra*, p. 42. The statutory provision involved in those cases was transferred by the 1959 amendments to Section 8(b)(4)(B) of the Act.

expressing its condemnation of coercive tactics to secure *any* secondary boycott agreement. Since Congress did not mean the 8(e) proviso to affect the legality of these tactics as employed in the construction industry, their use by the building trades must now run afoul of both the general and the specific statutory prohibitions.[16]

Moreover, even apart from the applicability here of Section 8(b)(4)(B), the interpretation of the 8(e) proviso for which the Unions contend would produce results inconsistent with other provisions of the Act. Section 8(b)(3) and 8(d) establish the duty of a majority representative to bargain in good faith about "wages, hours, and other terms and conditions of employment"—the so-called "mandatory" subjects of bargaining. As to these subjects, a majority representative may insist upon its position. Conversely, the duty to bargain about matters within the mandatory area carries with it the obligation to refrain from insisting upon inclusion in a contract of matters outside that area, for "such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349. A contract clause limiting the persons with whom the employer may do business, contrary to the petitioner Unions' assertion (Brief, pp. 17-21), is not a mandatory subject of bargaining

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[16] Just as do the same tactics in pursuit of secondary subcontracting clauses in a different industrial context. *Highway Truck Drivers* v. *N.L.R.B.*, 302 F.2d 897 (C.A.D.C.).

within the meaning of Section 8(d).[17] Insofar as a construction industry union and employer are concerned, it is at best a permissible subject of bargaining, one as to which "each party is free to bargain or not to bargain, and to agree or not to agree" *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349.[18] The secondary subcontractor clause, by definition, does not relate to "wages, hours, and other terms and conditions of employment" of the contractor's employees. It does not regulate the relations between the contractor as employer and his employees. It deals, instead, only with relations between the contractor and other employers. It is, therefore, as a regulation of third-party relationships extrinsic to the employment relation, a clause of precisely the type that *Borg-Warner* held non-mandatory (356 U.S. at 349-350).

The proviso "permits the making of voluntary agreements" (*supra*, p. 19). Conversely, it does not authorize an involuntary agreement, the promise given under duress, in response to coercion. An

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[17] Such a clause is to be distinguished from the typical "primary" subcontracting clause (see pp. 28-30, *infra*).

[18] In this industry, owing to the 8(e) proviso, the secondary subcontractor clause, like the "ballot" and "recognition" clauses in the *Borg-Warner* case, "is lawful in itself [and] would be enforceable if agreed to by the [employer]. But it does not follow that, because the [union] may propose these clauses, it can lawfully insist upon them as a condition to any agreement." 356 U.S. at 349. As to industries not covered by the 8(e) proviso, such a clause is not even a permissible subject of bargaining, but an illegal clause (see pp. 28-30, *infra*).

agreement of this sort, not being immunized by the proviso, falls under the ban of 8(e) proper. It is, therefore, "an agreement prohibited by Section 8(e)" within the meaning of Section 8(b)(4)(A). As the Board concluded, "the construction exemption in Section 8(e) was not intended to remove from the reach of [any part of] Section 8(b)(4) picketing and other proscribed conduct which is designed to secure such contracts as are before us in this case." (R. 57). This reading, in the Board's view, "gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved but condoning coercion as a means of obtaining such agreements would in our view be to pay observance to slavish literalism and to frustrate the Congressional objective. The Supreme Court periodically reminds us . . . that words used in a statute should not be literally construed, even where their literary purport is clear, if such construction would lead to absurd and incongruous results plainly at variance with the policy of the legislation as a whole." (*Ibid.*). Cf., *Int'l Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 189 F.2d 177, 185 (C.A. 9), aff'd, 342 U.S. 237, 243 ("literalness is no sure touchstone of legislative purpose").

2. *Article I-C of the Arizona Master Labor Agreement is an agreement to cease doing business within the intendment of Section 8(e) of the Act*

Section 8(e) literally makes unlawful any agreement between a union and an employer whereby the

employer agrees to cease doing business with any other person. This section, however, dovetails with Section 8(b)(4)(B) and, like 8(b)(4)(B), must be read to cover only "secondary" activity. "The question * * * is whether a particular agreement is fairly within the intendment of Congress to do away with the secondary boycott." *District 9, Machinists* v. *N.L.R.B.*, 315 F.2d 33, 36 (C.A.D.C.).

Thus, as the Unions correctly point out (Brief, p. 19), in the Board's view, a contract clause basically intended to preserve the work opportunities of employees in the unit covered by the contract is primary in nature and therefore outside the scope of Section 8(e), even though an incidental effect of the clause may be to limit the employer's freedom to do business with others.[19] On the other hand, if the basic target of the clause is the employment conditions of the employees of another employer, then the clause must be viewed as secondary in nature and therefore within the scope of Section 8(e), even though an incidental effect of the clause may be to benefit employees in the unit.[20] As the Board went

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[19] This view comports with the settled law relating to the original secondary boycott provisions of the Act. See, e.g., *Local 761, I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 672; *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 687-688.

[20] The ultimate purpose of most unlawful secondary boycott activity is to promote better working conditions, higher wages, and more work for members of the union generally. For it would be absurd even to suggest that a union would pursue such a course out of sheer caprice, and with nothing to gain but the bare cessation of business relationships be-

on to explain in the opinion from which the Unions reprint an excerpt (*Ohio Valley Carpenters District Council*, 136 NLRB 977, 49 LRRM 1908):

> [Contractual restrictions on having done elsewhere work usually performed by unit employees undoubtedly impinge upon an employer's freedom to engage in business with others.] But where they do no more than define and reserve for the exclusive performance of employees in a bargaining unit work of a kind that has traditionally been performed in that unit, they have a different function from the contracts that were the targets of 8(e). Restrictions designed to confine work to unit employees are immediately related to terms and conditions of employment *within the unit.* They anticipate no work to be performed by persons other than employees of the immediate employer. Their sole, direct, and primary aim is to protect and preserve work and therefore jobs for employees within the bargaining unit. In these respects limited restrictions of that character are quite different in purpose and intent from the "hot goods" clauses 8(e) was designed to ban—that is, the blacklisting of specified employers or classes of employers be-

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tween employers. "A finding of an illegal intermediate object is all that is required." *Amalgamated Meat Cutters, etc.* v. *N.L.R.B.*, 237 F.2d 20, 25 (C.A.D.C.), cert. denied, 352 U.S. 1015. If ultimate economic motivation established the legality of a union's conduct, the secondary boycott proscriptions of the Act would become a dead letter. As this Court has succinctly stated, "the prohibition of section 8(e) is a broad one. Agreements of this kind, whether express or implied, are not made lawful by economic necessity." *N.L.R.B.* v. *Amalgamated Lithographers*, 309 F.2d 31, 36 (C.A. 9), cert. denied, 372 U.S. 943.

> cause their products or labor policies are objectionable to the union. A "hot goods" clause anticipates work to be performed by persons other than the employees of the immediate employer. Without such anticipation the "hot goods" clause serves no purpose, for its interest is to empower the union to regulate the dealings of the immediate employer with others by dictating with what class of other employer the immediate employer may deal, or under what conditions. In short, it is with work or conditions of work outside the contract's bargaining unit that "hot goods" clauses are immediately concerned.

In short, the touchstone of a clause's legality must be "whether the contract provisions in question extend beyond the employer and are aimed really at the union's difference with another employer." *Local 636, Plumbers* v. *N.L.R.B.*, 278 F.2d 858, 864 (C.A.D.C.). Like the "hot goods" clause described above, the subcontractor clause is clearly secondary which limits not the fact of subcontracting—either prohibiting it outright or conditioning it upon, e.g., current full employment of the signatory employer's employees—but *the persons with whom* the signatory employer may subcontract. Its purpose is a termination of business dealings between the signatory employer and others of whom the union does not approve or with whom it has a dispute. The secondary subcontractor clause, therefore, like the "hot goods" clause, falls within the scope of Section 8(e). *District 9, Machinists* v. *N.L.R.B.*, *supra*, 315 F.2d at 36-37; *Highway Truck Drivers, Local 107* v. *N.L.R.B.*,

302 F.2d 897 (C.A.D.C.); cf., *N.L.R.B.* v. *Int'l Union of Operating Engineers*, 293 F.2d 319, 323 (C.A. 9).[21]

The Unions' attempt (Brief, p. 20) to justify their contract clause and their picketing by invoking such cases as *Local 24, Teamsters* v. *Revel Oliver*, 358 U.S. 283, founders on the fact that it is the function or focus of a clause that determines whether it is "primary"—a mandatory subject of bargaining for which strike pressure may be employed—or "secondary" and so within the ambit of 8(e).[22] For *Oliver* illustrates the type of work-protection purpose which, as we have just shown, is primary and protected though an incidental effect is a limitation on the contracting employer's unfettered freedom to contract with others. *Oliver* involved the applicability of state anti-trust laws to a collective bargaining contract clause setting minimum rental rates for any truck "leased to a [signatory] carrier by an owner who drives his vehicle in the carrier's service," and only at such times, the driver-owner then being considered an employee of the carrier, with his wages, hours, and working conditions those established by the contract (358 U.S. at 284-285, 286-287). The union had sought, by this clause, to prevent the *carriers* paying below-cost rental fees as a device by

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[21] Indeed, the very terminology of the first proviso to Section 8(e) indicates congressional belief that in order to save voluntary subcontractor clauses in the construction industry from the 8(e) ban it was necessary specifically to describe them.

[22] And likewise 8(b)(4)(B), see *infra*, pp. 39-42.

which, in effect, to pay wages lower than their contract scale (*id.* at 291-292). Because this objective bore such an intimate relation to the carrier wage scale set by the contract and to the protection of the carriers' regular employees' jobs against a possible reduction in number were the carriers able to operate at lower cost by substituting owner-drivers on inadequate rental fees, the Court found the rent-fixing clause within the area of bargaining made mandatory by federal law, hence immune to state regulation (*id.* at 293-295, see also, *U.S.* v. *Drum*, 368 U.S. 370, 382 n. 26). In short, *Oliver* teaches that a contract clause designed to protect the wages and work of the employees of the contracting employer—the *only* employer to whom the challenged clause referred—is a mandatory subject of bargaining. Manifestly, the case neither holds nor implies a contract clause primary and bargainable which seeks to determine conditions of work outside the contract's bargaining unit by dictating with what class of other employer the contracting employer may do business.[23]

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[23] The other cases relied on by the Unions to show the legitimacy of their insistence on Article I-C of the Master Agreement similarly fall short of the mark (Brief, pp. 19-21). In a recently issued opinion denying a petition for rehearing, the court in *Deaton Truck Line, Inc.* v. *Local 612, Teamsters,* F.2d (C.A. 5), 51 LRRM 2552, opinion modified and reh. denied, March 14, 1963, 52 LRRM 2728, 2729, withdrew the language quoted by the Unions (Brief, p. 20) and expressly refused to pass on questions of the relationship between the contract clause in dispute and the wages established by the contract. In any event, *Deaton* was an action under Section 301 of the Act to compel arbitration

In the context presented in this case, where the subcontractor clause is sought to be imposed upon a

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of a dispute over the meaning of a contract clause. The possible applicability of Section 8(e) was apparently not raised; it is nowhere mentioned by the court. The Board does not, of course, deny a union's "interest" in maintaining and protecting its area wage standards, but importance to the union is not a criterion on which Board or court decisions may be rested where, as with the closed shop or unlimited recognitional picketing or—here—secondary boycott agreements, Congress has determined that interests may not be advanced or advanced by designated means. Hence, however "legitimate" a union's interest in area standards, it may not be advanced by contractual arrangements outlawed by Section 8(e).

The Board's decision in *Local Union No. 741, (Keith Riggs Plumbing),* 137 NLRB No. 121, 50 LRRM 1313, is likewise inapposite, for the question at issue there was not the lawfulness of standards picketing, whatever its effect—no provision of the Act renders this unlawful—but simply whether the union had transgressed Section 8(b)(7)(C) by picketing for organizational or recognitional purposes.

Finally, *Order of R.R. Telegraphers* v. *Chicago & Northwestern Ry. Co.,* 362 U.S. 330, decided under the Railway Labor Act, and the Board's subsequent decision in *Town & Country Mfg. Co.,* 136 NLRB No. 111, 49 LRRM 1918, enforced, April 29, 1963, No. 19679, F.2d (C.A. 5), 53 LRRM 2054, finding the same principle embodied in Section 8(d) and 8(a)(5) of the National Labor Relations Act, as amended, are equally irrelevant here. That an employer is dutybound to bargain with the representative of his employees before abandoning or otherwise ceasing himself to perform a customary function, with resulting loss of employment to the employees, is a consequence of his duty to bargain about "wages, hours, and other terms and conditions of employment." As we have shown, *supra,* pp. 25-26, the subcontractor clause limiting not the fact or practice of subcontracting but the persons with whom the signatory employer may deal is unrelated to these topics of mandatory bargaining.

general contractor for whom subcontracting is the normal mode of carrying on his enterprise, it cannot cogently be suggested that, as the Unions argue, Article I-C represents a legitimate, primary attempt to remove the economic incentive for contracting out bargaining unit work, or as the Unions phrase it, "dodging the collective bargaining agreement" (Brief, pp. 18, 19). Article I-C is not limited, as they assert (Brief, p. 19), so as to apply only when work is subcontracted which would otherwise be performed by the general contractor's employees. On the contrary, it applies to all "subcontract construction work as defined hereafter in Article III of this Agreement," and Article III is phrased in the broadest terms to include anything that could be thought of as construction.[24] Moreover, Article I-C goes on to

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[24] Thus, Article III, entitled "Work Covered," provides:

"A. The Construction of, in whole or in part, or the improvement or modification thereof, including any structures or operations which are incidental thereto, the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned work and services and including, but not limited to, the following types or classes of work:

"B. Street and Highway work, grading and paving, mechanical land leveling, excavation of earth and rock, grade separations, elevated highways, viaducts, bridges, abutments, retaining walls, subways, airport grading, surfacing and drainage, electric transmission line and conduit projects, water mains, pipe lines, sanitation and sewer projects, dams, tunnels, shafts, aqueducts, canals, reservoirs, intakes, channels, levees, dikes, revetments, quarrying of breakwater or riprap stone; foundations, pile drivings, piers, lock, dikes; river and harbors projects; breakwaters, jetties and dredging; warehouses, shops and yards, the construction, erection,

define the "subcontractor" who must observe "the terms of this Agreement" as "any person, firm or corporation who agrees under contract with the general contractor or his subcontractor to perform on the job site *any part or portion of the construction work covered by the prime contract* * * *." Colson employs only carpenters and laborers, subcontracting all other kinds of work required by its prime contracts (Tr. 177). Article I-C would thus have precluded Colson from continuing to do business with any subcontractor not bound or willing to become bound by "the terms of this Agreement" even though that subcontractor could not be "competing" with Colson's own employees. In short, Article I-C would have compelled Colson "to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit" *District 9, Machinists* v. *N.L.R.B.*, 315 F.2d 33, 36 (C.A.D.C.).

The Unions urge that Article I-C means only that Colson would have been responsible "to see to it that the wage and working standards set out in the Agreement shall be complied with" by its subcontractors (Brief, p. 19). The description does not fit, we submit, a clause requiring of all subcontractors

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alteration, repair, modification, demolition, addition or improvement in whole or in part of any building structure, including oil and gas refineries and incidental structures, also including any grading, excavation, or similar operations which are incidental thereto, or the installation, operation, maintenance and repair of equipment, and other facilities used in connection with the performance of such building construction.

"C. * * * * *"

"the observance . . . *of the terms* of this Agreement." This is not, on its face, simply a provision to make certain that the subcontractor maintains labor standards commensurate with those of the signatory general contractor. Here, as in *N.L.R.B.* v. *Bangor Bldg. Trades Council*, 278 F.2d 287 (C.A. 1), where the clause sought to be enforced provided that "this Agreement binds all the subcontractors as well as the general [signatory] contractor," it may well be said that the clause in question "is plainly broader than the payment of wages. It contains no exceptions, but embraces all the provisions of the [general's] contract. *Hence it includes union recognition.*" *Bangor Bldg. Trades Council*, 278 F.2d at 288, 290, emphasis added. And furthermore, again as in *Bangor Bldg. Trades Council, supra* at 290, the Unions "were not unaware of this." At their meeting with Colson on January 12, where Colson was given and asked to sign the Master Agreement, much of the discussion concerned its impact upon the Company's existing subcontract commitments with nonunion subcontractors, and a proposal that the Unions permit completion of a partially-built church with nonunion subcontractors then on the job if the two school construction projects were made the "breaking-off point" when the Company would convert to all-union subcontractors. Indeed, the Unions appear to concede the point: "much of the conversation concerned a 'breaking off' point, that is a point in time in the future when the subcontractor clause (Art. I.C.) in the Arizona Master Labor Agreement would be effective." (Brief, p. 7).

D. *The Unions' picketing for the Master Agreement also violated Section 8(b)(4)(B) of the amended Act*

Section 8(b)(4)(B) of the amended Act, to the extent relevant here, carries forward the provisions of the original secondary boycott section, Section 8(b)(4)(A) of the 1947 Act. As already noted, *supra*, p. 9, these original provisions proscribed certain conduct, including picketing, where "an object" was to force a neutral person—one with whose labor practices the union had no quarrel—to "cease doing business" with another person of whom, for whatever reason, the union disapproved. The prohibition thus pronounced did not depend upon the existence of an active labor dispute between the union and the disapproved, "primary" employer,[25] nor was it relevant that the union had other or alternative ends in view when it struck.[26] Likewise, neither the fact that the union and struck employer were parties to a contract giving the union the right to demand the cessation of practices against which it struck, or sanctioning the unit employees' right to refuse to

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[25] *N.L.R.B.* v. *Washington-Oregon Shingle Weavers,* 211 F.2d 149, 152-153 (C.A. 9); *N.L.R.B.* v. *Local Union No. 751, Carpenters,* 285 F.2d 633, 639 (C.A. 9); *N.L.R.B.* v. *Local 11, Carpenters,* 242 F.2d 932, 934-935 (C.A. 6); *Local 1976, Carpenters,* 113 NLRB 1210, 1211-1212, 1213-1214, enforced, 241 F.2d 147, 154 (C.A. 9), aff'd, 357 U.S. 93.

[26] *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council,* 341 U.S. 675, 689; *N.L.R.B.* v. *Local 74, Carpenters,* 341 U.S. 707, 713; *N.L.R.B.* v. *Int'l Union of Operating Engineers,* 293 F.2d 319, 322-323 (C.A. 9).

participate therein,[27] nor the fact that the union abandoned its coercive tactics short of achievement of its goal [28]—neither of these states of affairs militated against a Board finding of illegality in the coercion actually employed, for "an" objective plainly proscribed. Accordingly, on settled law, if the Board properly found that an object of the Unions' picketing was a cessation of business between Colson and its nonunion subcontractors, then "an object" of the Unions' picketing was unlawful, and insofar as that object was concerned Colson was a "neutral," [29] notwithstanding that the picketing had also recognitional and/or organizational objects, and regardless of the fact that the Unions may have had no active dispute with Colson's nonunion subcontractors. Similarly, it is immaterial that the Unions abandoned their picketing before having achieved their purpose of procuring Colson's assent to the Master Agreement; 8(b)(4)(B) does not presuppose that the union exerting unlawful pressure upon a

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[27] *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 106; *N.L.R.B.* v. *Int'l Union of Operating Engineers*, 293 F.2d 319, 323 (C.A. 9); *N.L.R.B.* v. *Bangor Bldg. Trades Council*, 278 F.2d 287, 290 n. 4 (C.A. 1); *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F.2d 149, 151 (C.A. 9). For a like holding under the amended 8(b)(4)(B), see *New York Mailers* v. *N.L.R.B.*, F.2d (C.A.D.C.), 52 LRRM 2433, 2434 (decided February 14, 1963).

[28] *N.L.R.B.* v. *Local Union No. 751, Carpenters*, 285 F.2d 633, 637-638 (C.A. 9); cf., *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 97 n. 2.

[29] Cf., *Local 636, Plumbers* v. *N.L.R.B.*, 278 F.2d 858, 864 (C.A.D.C.).

neutral intends to maintain its strike or picketing indefinitely (Union Brief, p. 16). See *N.L.R.B.* v. *Local Union No. 751, Carpenters*, 285 F.2d 633, 637-638 (C.A. 9).

That Article I-C of the Master Agreement for which the Unions picketed embodies a "cease doing business" objective would scarcely seem debatable. As we have just shown, once a general contractor becomes signatory to the Agreement, he is precluded "by its very terms" (R. 55) from dealing with subcontractors who will not likewise abide by its terms; that is, he must transfer his subcontracts to employers who will comply with the Agreement. Thus a union that pickets a general to require acceptance of such a clause is coercing him for the purpose of creating pressure on another, who must acquiesce in the union's demands or lose his subcontracts.

As the Board pointed out, "picketing in these circumstances was held to be for an object of forcing an employer to cease doing business within the meaning of Section 8(b)(4)(A) of the Act, prior to the 1959 amendments." (R. 55). *N.L.R.B.* v. *Local 47, Int'l Brotherhood of Teamsters*, 234 F.2d 296 (C.A. 5), enforcing 112 NLRB 923, held violative of then Section 8(b)(4)(A) picketing of general contractors in the construction industry to force their acceptance of a contract clause providing that "any subcontractor engaged to perform work covered by this agreement for employer shall assume all terms and conditions of this agreement" (*id.* at 298). The union, having sought without success to organize building

industry truckdrivers in the area, most of whom were employed by subcontractors, set out to attain this ultimate objective by negotiating with the general contractors an agreement covering truckdrivers and containing the subcontractor clause quoted above (*id.* at 297-298). One contractor contacted was amenable to those portions of the agreement establishing conditions of employment for his driver employees, and the other explained to the union that he did not employ drivers; both contractors, however, resisted signing the subcontractor clause (*id.* at 298, 299). The union thereupon picketed building projects of each contractor, one of whom capitulated and signed the contract, complete with subcontractor clause (*id.* at 299). Since an object of the union's conduct in seeking the subcontractor clause was to force the contractors to cease doing business with any subcontractor who refused to abide by the truckdrivers agreement, the union's picketing for that object violated the secondary boycott provision of the Act (*id.* at 300-301).

Similarly, in *Bricklayers, Masons and Plasterers Int'l Union* (*Selby-Battersby*), 125 NLRB 1179, 1181-1182, the Board found the secondary boycott provision of the 1947 Act violated by a strike against a union subcontractor, the "admitted purpose" of which was to force the subcontractor to incorporate in its union contracts a clause "admittedly designed to curtail open-shop conditions in the building and construction industry" in the area by requiring the signatory employers to cease doing busi-

ness with nonsignatories.[30] The union's object was unlawful notwithstanding the fact that here (unlike the situation in the *Local 47* case, *supra*) the agreement sought permitted the completion of nonunion jobs already underway and thus would "disrupt secondary relationships at a future time." This was so, said the Board, because "the impact of the strike was nevertheless immediate," and the general contractors with whom Selby was pressured to cease doing business constituted a well-defined, identifiable group.

Indeed, the purpose of a secondary subcontractor clause (or secondary contractor clause, as in *Selby, supra*), the very reason why unions desire such provisions, demonstrates that the resort to 8(b)(4) means to extract an employer's assent was to force or require him "to cease doing business with any other person" within the meaning of the original secondary boycott provision of the statute. That purpose is a boycott of the persons in the blacklisted group, to induce their conformity to the union's wishes so that they may become "delisted." Such a clause was not in itself a violation of the Act not because it did not contemplate an interruption of

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[30] The clause read in relevant part: "This agreement shall not be construed to require any worker to work with non-union workmen engaged in construction, nor to work for members of the parties of the first part on any building or job for any firm or person having construction work done in the Baltimore area by non-union workmen, provided . . . the union of the trade in which such non-union men are working is . . . affiliated with the Building and Construction Trades Department of the AF of L, and has a similar agreement with a recognized association of employers." (125 NLRB at 1181.)

business relationships—manifestly, it did—but because it did not comprehend the prohibited means. Just as an employer could lawfully agree to boycott others, a union could seek his agreement by persuasion or even by coercion, so long as it refrained from the specifically prohibited means. But if an employer was unwilling to agree, the union that struck or picketed to force him to do so thereby deprived him of "freedom of choice at the time the question whether to boycott or not [arose] in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy" *Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 105. It would be idle to suggest that to the building contractor who lives by subcontracting there can be anything abstract or contingent about a legally binding agreement to boycott a category of subcontractors; once entered into, it exercises a continuing constraint, requiring him to desist from letting subcontracts to those on the blacklist. Among the "legal radiations" [31] of the agreement is its specific enforceability, with the result that, by virtue of its original coercion the union has successfully embroiled the contractor in a labor dispute not his own. Thus, compliance with such an agreement by one whose assent would not have been given but for the pressure of picketing or a strike would represent the "transmi[ssion] to the moment of boycott, through the contract, [of] the very pressures from which Congress ha[d] determined to relieve secondary employers" *Local 1976, Carpenters, supra,* at 106.

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[31] *Local 1976, Carpenters, supra,* at 108.

There is no merit to the Union's contention that, as a matter of fact, there were no contractual relationships between Colson and its nonunion subcontractors Schwartz, Riggs, and Haun "which would have been affected by the terms of the [Master] Agreement" had Colson capitulated to the Unions' pressure to sign. In the first place, as indicated above in discussing the *Selby-Battersby* case, there is no reason artificially to limit the concept of a cessation of business to the severance of currently existing contractual relationships. Plainly, where A customarily does business with B (or where A, having done business with B intends and expects to do so again), if A desists from further dealings with B in response to a blacklist, the consequence would be described in ordinary language as a "cessation" of the business relations between A and B. See *N.L.R.B.* v. *Local 9, Wood, Wire & Metal Lathers Union*, 255 F.2d 649, 652-653 (C.A. 4). That the word "refrain" might also apply is inconsequential, for there is no reason to view the two terms as necessarily mutually exclusive. Nor does *Hoffman* v. *Joint Council of Teamsters, No. 38*, F.Supp. (N.D. Cal.), 45 Lab. Cases para. 17,803, hold to the contrary, as the Unions assert (Brief, p. 15). Rejecting the position of the respondent-unions "that the word 'refrain' refers specifically to future conduct, as distinguished from the word 'cease,' which is said to refer only to present conduct," Judge Halbert concluded that there can be contexts in which the words are synonymous. "Unquestionably," he wrote, "the word 'cease' implies that the objective

referred to has been in existence, and is to be stopped." We agree; when A has been doing business with nonunion subcontractors, and that "is to be stopped," then A is to "cease doing business" with the subcontractors.[32] Cf., *United Marine Division, Local 333, ILA*, 107 NLRB 686, 697-698, 708-709; *Amer. Fed. of Radio & Television Artists* v. *Getreu*, 258 F.2d 698, 700-701 (C.A. 6).

In any event, Colson had "existing" subcontracts with each of the named subcontractors during the period of picketing. Schwartz had a subcontract on the Yellow Front project, where he worked during the picketing (Tr. 142, 143, 144); Haun had subcontracts on both the Yellow Front project and the two schools (the latter entered into in December, 1960), worked at Yellow Front during picketing, had to make special arrangements for the delivery of materials to the schools because his supplier's deliverymen would not cross the picket line (Tr. 122, 126-129, 132); Riggs had the plumbing subcontract on the two schools and his men worked there during the picketing (Tr. 208, 53, 60). And assuming with the Unions that "the rights and liabilities of the sub-

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[32] In the *Hoffman* case, a proceeding for preliminary injunction under Section 10(1) of the Act, Judge Halbert found certain contract clauses illegal under Section 8(e), and others not thus unlawful, according to whether the language employed "could affect firms presently doing business with the [contracting] employers." In the subsequent Board decision on the merits, *Joint Council of Teamsters No. 38*, 141 NLRB No. 14, 52 LRRM 1322, on a similar analysis the Board found all of the challenged clauses prohibited by Section 8(e).

contractors [were] already fixed by such existing subcontracts" so that Colson could not compel any changes therein (Brief, p. 15), the conclusion follows that had Colson then succumbed and signed, it would have had no choice but to break the existing subcontracts. The Unions would then have been entitled to specific performance of the employer obligation in Article I-C to see that "the terms" of the Master Agreement "extend to and bind such construction subcontract work [by] provisions . . . in such subcontract . . ."; if Colson could not have performed affirmatively, its only option would have been a termination of the subcontracts.

Finally, it avails the Unions nothing that the Master Agreement has no provisions relating specifically to plumbers and brick masons. It may be that the three subcontractors, Schwartz, Riggs and Haun, employed no persons in any of the classifications set forth in Appendixes A-D to the Master Agreement, so that specific craft provisions in the Agreement and Appendixes would have no impact on them. The contract's general provisions, comprising the greater bulk of the agreement, were nonetheless fully applicable.[33] Moreover, that the Unions themselves recognized the applicability of the Agreement to contractors and workmen outside the four basic trades

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[33] See, e.g., the provisions of Article I-C itself, Article III ("Work Covered"), Article IV ("Classifications"), Article V ("Procedure for Settlement of Disputes and Grievances"), Article VII ("Apprentice Training"), Article VIII ("Modification"), Article XIV ("Expense Allowance"), Article XV ("Health and Welfare"), (G.C. Exh. 44).

is demonstrated by the Agreement itself: Article XII, entitled "Additional Contracting Unions," states the matter clearly:

> The Unions will make every effort *to bring all crafts* affiliated with the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations *under the terms and provisions of this Agreement*, and the Contractors will make every effort to bring *all Contractors performing work* in the State of Arizona *under the terms and provisions of this Agreement.*

In sum, as the Board concluded, the Unions by their picketing sought to force or require Colson's assent to an agreement which "by its very terms would have compelled Colson to cease doing business with Schwartz, Riggs, and Haun, its nonunion subcontractors, if they did not comply with the contract's provisions. All parties recognized that this was the necessary effect of Colson's signing the Master Agreement . . . . and it was intended, we find, that Colson would implement the contract and cease doing business with the above-mentioned nonunion subcontractors." (R. 55). While thus agreeing with the Trial Examiner's finding that "all concerned expected changes in these [subcontractor] relationships once the Master Agreement was signed" (R. 28), the Board was warranted in rejecting his reasoning that since Colson's signing was the immediate objective, enforcement was left to the future (*ibid.*). Here, as in other contexts, the Board may hold one to have intended the natural and prob-

able consequences of his actions. Cf., *N.L.R.B.* v. *Erie Resistor Corp.*, U.S. , 53 LRRM 2121, 2124 (decided May 13, 1963). Reason requires no such artificial separation between the Unions' coercive conduct to obtain the Master Agreement and their ultimate objective vis-a-vis the subcontractors as manifested by Article I-C, and the economic realities commend its rejection. For if the Unions could force the agreement upon Colson, then they could—by lawful means—force his compliance with it, and none could then doubt that the Unions had as a practical matter "transmit[ted] to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers" (*Local 1976, Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 106). To paraphrase Mr. Justice Frankfurter's words in the *Sand Door* case (*ibid.*), the realities of coercion are not altered simply because it is said that the employer is forced to enter into an enforceable engagement rather than forced now to cease doing business with another.[34]

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[34] There is no merit to the Examiner's proposition, relied on by the Unions (Brief, p. 30), that Congress cannot have forbidden under Section 8(b)(4)(B) picketing which it "permitted" under Section 8(b)(4)(A) (R. 28). Even assuming arguendo that an effect of the 8(e) proviso were to render 8(b)(4)(A) inapplicable in the construction context, it is plain that picketing thereby exempted from a prohibition could not aptly be termed "permitted." In other words, by choosing to exclude certain conduct from the ban in one section of the Act, Congress neither gives that conduct affirmative sanction nor manifests an intention to exclude it also from any or all other sections.

II. The Board properly concluded that neither Union violated Section 8(b)(7)(C) of the Act

Section 8(b)(7)(C) of the Act, insofar as here relevant, limits picketing by an uncertified union "an object" of which is forcing an employer to recognize or bargain with it, or the employees to accept or select it as their bargaining representative, "where such picketing has been conducted without a petition under section 9(c) being filed *within a reasonable period of time not to exceed thirty days* from the commencement of such picketing." [35]

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[35] The Section provides, in full:

> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
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> * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ mem-

As the Board pointed out, and as the petitioning Association does not here dispute, in the circumstances of this case "the applicable test" of whether either Union violated Section 8(b)(7)(C) "is whether the picketing had been conducted for more than a reasonable time, not to exceed 30 days from the commencement thereof." (R. 58). Since the picketing of *each* Union was terminated within the period permitted by the Act, neither could be found in violation of 8(b)(7)(C) unless each must be held responsible for the other's picketing so that together, in effect, they picketed for more than the permitted 30 days. In agreement with the Trial Examiner, the Board found that the allegation of joint or concerted picketing was not supported by a preponderance of the evidence (R. 58-59, 28-29).

We submit that the Board's conclusion was correct on this record and that the facts stressed by the petitioner Association do not militate against it. In brief, those facts are two: that both Local 1089 and Local 383 were members of the Phoenix Building and Construction Trades Council, and that both were signatory to the Master Agreement. These two circumstances are insufficient to establish that the Unions

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bers of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

were engaged in a joint campaign to wrest recognition from Colson, much less joint picketing. There is no evidence of any Trades Council action germane to the question; its committee to investigate the Carpenters' charge that Colson was "unfair" was not shown to have had any mission other than investigation,[36] and the same is true of the "survey committee" that visited Colson a few days before the January 12 meeting. According to the testimony, the survey committee had nothing to do with recognition but rather gathered information on what construction was being done in the area and by whom (Tr. 296-297, 391-392, 397-398). On January 10, that committee talked with Stevens and set up a meeting with building trades representatives for January 12; the conversation was brief, recognition was not discussed, and Stevens specifically asked that a Carpenters representative be present at the subsequent meeting (Tr. 392-394, 298-300, 334-336, 249-250). Obviously, nothing in either this encounter or the Trades Council's earlier dispatch of a committee to investigate the Carpenter's "unfair" charges "demonstrates," as the Association asserts, "that the Unions coordinated their recognition demands through the council"

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[36] Ellison, the Carpenters' representative on that committee when it visited Colson in October, of course had an additional purpose, as we have shown, but this hardly suggests that each of the other union agents present—or the Council—shared that purpose. We assume that each would have desired, or hoped for, Colson "going union," but this would presumably be true as a general proposition of all unions; it cannot prove a common campaign or a principal-agent relationship.

(Assoc. Brief, p. 14). Nor does the fact that the Unions agreed, at the January 12 meeting, to take up in the Trades Council the matter of permitting Colson to complete its "church job" with its existing non-union subcontractors show that the Carpenters and Laborers, in asking recognition, were acting in "a representative capacity" — presumably, as "representatives" of the Council (Assoc. Brief, p. 14). The offer is at least as consistent with a recognition by Carpenters and Laborers that, while they could assure that they would not enforce Article I-C on the "church job," other crafts might object and/or establish pickets and thus disrupt Colson's business unless prior arrangements to the contrary were made on the initiative of the Unions seeking recognition from Colson. To seek such an arrangement is not to betray a prior Trades Council plan to organize Colson. Were the Board to have predicated a finding of "joint venture" on the Unions' common participation in the Trades Council, surely it could not have been said to have rested upon substantial evidence.

The Association's reliance on the Master Agreement also proves either too much or too little. Thus, if the fact that both Local 1089 and Local 383 were signatory to the Agreement suffices to make each responsible for the other's picketing, then the same fact suffices to hold all other unions signatory to the Agreement, a patently preposterous proposition. Since the statutory violation in question here is not the demand for recognition, or even picketing for recognition, but rather overly-extended picketing for that purpose, it seems evident that it is the *picketing* of the

two Unions that must be connected and not simply the fact, much stressed by the Association, that both were party to the Master Agreement. On the other hand, that recognition of either through the Master Agreement would have resulted in recognition of the other is not sufficient to show that the Unions were jointly engaged in seeking recognition, either in general or specifically from Colson. That Laborers Local 383 would gain "derivative benefits" (R. 5) were Colson to have signed the Agreement for Local 1089—just as would some 15 other unions—does not show that Local 1089, in seeking recognition, "[was] requesting recognition, or . . . even interested in obtaining recognition, for the Laborers" (R. 58). At the most, the Master Agreement shows a jointness of collective bargaining demands and contract terms, once there is recognition; it does not, by its own bootstraps, show a common plan to obtain recognition. Still less does the existence of the Master Agreement and the fact that the Unions, at different times, in different places, and without communication between them picketed to obtain it, show a concerted plan to obtain recognition by any and all means, legal and illegal. Commonness for one purpose is not commonness for all, and all that the record here shows as to concert of action between the Unions is that, in the Master Agreement, they have agreed upon substantive contract terms. A joint campaign to organize Colson cannot be inferred from the provisions of the Master Agreement.

If such a campaign is not shown on this record, there is plainly no basis for imputing to either Un-

ion responsibility for the other's picketing. The testimony of the Union agents who ordered the picketing shows, without contradiction, that neither informed the other that it planned to picket, sought approval by the other, sought picketing or financial assistance from the other (or, indeed, any other union), or notified the other when the picketing was terminated (R. 59, 29; Tr. 286-289, 296, 310, 400, 401-402, 351-352). Similarly, neither Union notified the Trades Council of its picketing, or sought approval or aid from the Council (*ibid.*). Accordingly, as the Trial Examiner found, "Although each Local stood to benefit by the picketing of the other and no doubt each was sympathetic to the other's design and purpose *there is little but speculation* to support a conclusion that the Locals were allied in the matter. . . . The allegation that they were 'acting in concert or participation with each other' in this respect is not supported by a preponderance of the evidence." (R. 28-29).

III. The Board's order is reasonable and proper

Having found that the Unions violated both Section 8(b)(4)(i)(ii)(A) and (B) by picketing to force upon Colson an agreement prohibited by 8(e) and to force Colson to cease doing business with subcontractors Schwartz, Riggs, and Haun, the Board ordered each Union to cease and desist from these practices. The order specifically prohibits the Unions from utilizing the unlawful means here employed to procure an 8(e) agreement from Colson "or any other employer," and from resorting to the same

means—strikes or picketing—against "any other employer" with an object to force a cessation of business with the three named subcontractors (R. 60, 61).

As we read the Unions' brief (pp. 30-31), they do not object to the first part of the order, paragraph 1.(a). In any case, the injunction is adapted to the problem presented. The Master Agreement, with its cease-doing-business clause, is just what its title implies, the Unions' standard agreement; hence it is to be anticipated that each will continue to demand its adoption by area contractors and, unless restrained, to utilize strike pressure to that end. As set forth above, the Unions and employers may lawfully execute Article I-C if both choose to do so; the order, therefore, does not nullify the clause or restrain the Unions from asking its adoption. But when another employer is unwilling to commit himself to boycott, he, like Colson, is entitled to his choice. Accordingly, the order bars only strikes or picketing aimed at exacting the clause. It is thus, we submit, appropriately and specifically tailored to the situation which calls for redress.

The second portion of the Board's restraining order is also fitted to the violation shown, that is, to preventing a repetition of coercion against neutrals to bring about the business exile of Schwartz, Riggs, and Haun. Nor need either Union find itself on the horns of a dilemma as a consequence of this paragraph. If, in fact, it has "legitimate grievances" against employers "totally unconnected with the presence of [any of the three] subcontractors," then

its strike or picketing over the grievances would not fall within the injunction. Only if the Unions continue to seek the exclusion from construction projects of these nonunion subcontractors can they have any real question as to whether or not they may lawfully picket a project on which one of the three is working.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for review should be denied, and that a decree should issue enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

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